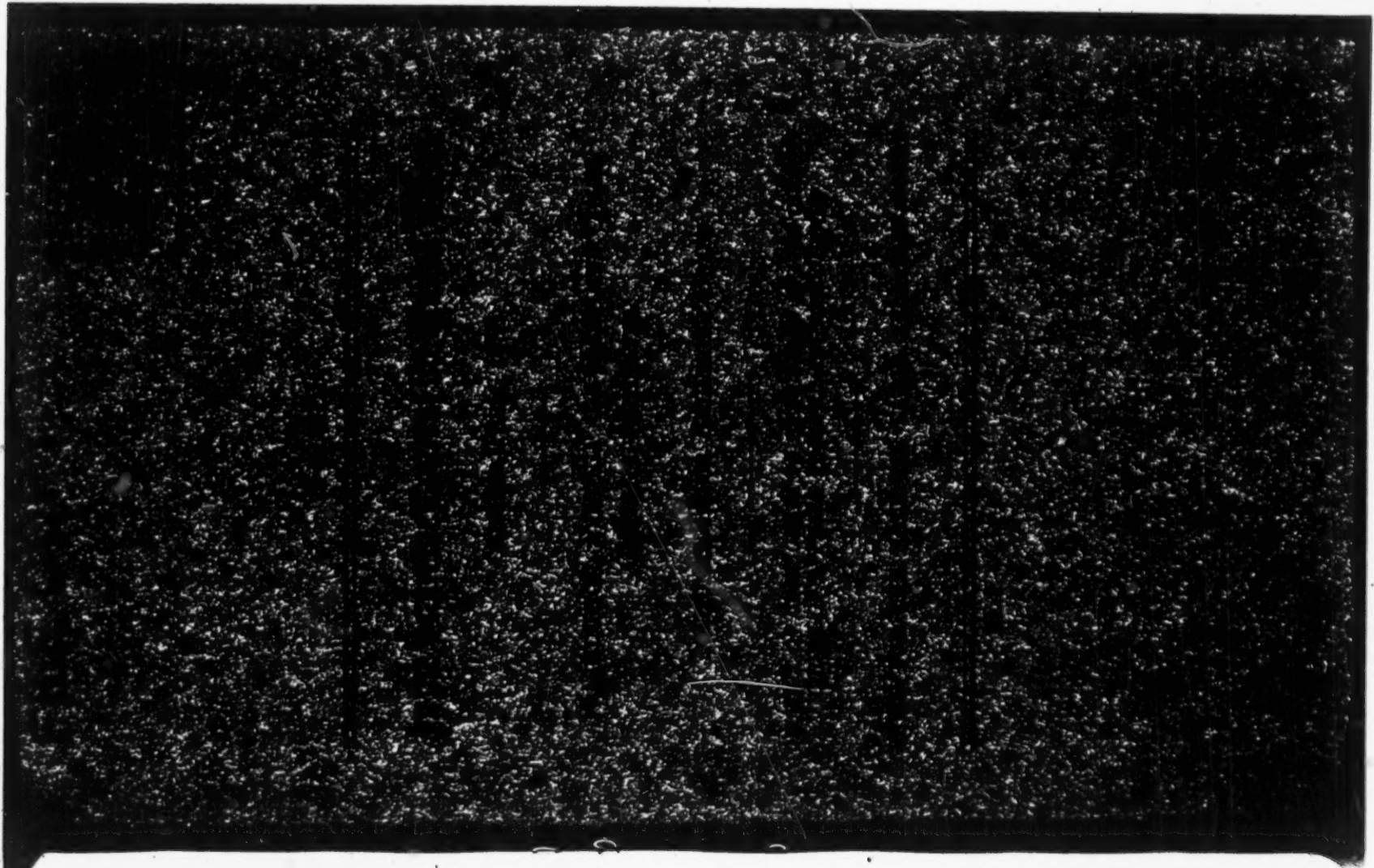

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 469

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 589) is reported in 85 F. (2d) 990. The findings of fact and order of the National Labor Relations Board (R. 525–549) are reported in 1 N. L. R. B. 769 (1936).

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Fourth Circuit was entered October 8, 1936 (R. 598). The petition for writ

of certiorari was filed October 17, 1936, and was granted October 26, 1936. Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

1. Whether the National Labor Relations Act, as here applied to this petitioner, is a valid exercise by Congress of its power to regulate commerce with foreign nations and among the several States.

2. Whether the provisions of Section 8, subdivisions (1) and (3) of the National Labor Relations Act, as applied to this petitioner, are consistent with the Fifth Amendment.

3. Whether the provisions of the National Labor Relations Act, as here applied, deprive petitioner of the right of trial by jury guaranteed in the Seventh Amendment.

4. Whether petitioner is entitled to question the validity of provisions of the Act other than those here invoked against it, or the application of the Act to persons other than petitioner, and, if so, whether the validity of such provisions or applications is material, because of their separability.

STATUTE INVOLVED

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. I, Title 29, Sec. 151 *et seq.*) is printed as an Appendix to the brief in No. 365, *The Associated Press* v. *Na-*

tional Labor Relations Board, and is also summarized at pp. 3–8 of that brief.

STATEMENT

On March 5, 1936, Local No. 1079, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, a labor organization, filed a written charge against the Washington, Virginia and Maryland Coach Co., petitioner herein, pursuant to Section 10 (b) of the National Labor Relations Act and to Article II, Section 2, of the Rules and Regulations of the Board (R. 8–13). A supplemental charge was filed on March 10, 1936 (R. 14–18). On March 11, 1936, the National Labor Relations Board, through its Regional Director for the Fifth Region, issued a complaint embodying the charges, pursuant to Section 10 (b) of the Act and Article II, Section 5 of the Regulations (R. 19–24). The complaint alleged that petitioner was engaged in the operation of motor buses for the transportation of passengers and express for hire between points within the District of Columbia and the States of Virginia and Maryland; that petitioner had discharged and refused to reinstate certain drivers and garage employees because of their membership and activity in the above mentioned Local No. 1079; and that petitioner thereby had engaged in, and was engaging in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act (R. 23).

On March 23, 1936, petitioner, appearing specially, filed a motion to dismiss the complaint on the ground that the National Labor Relations Board had no jurisdiction over it, and also on the ground that the Act as applied to petitioner by the Board contravened Article I, Section 1, and Article III, Sections 1 and 2 of the Constitution and the Fifth, Seventh, and Tenth Amendments (R. 26–28). Petitioner also filed an answer not waiving its objections to jurisdiction, admitting substantially the allegations relating to the nature of its business, admitting that it had discharged and refused to reinstate certain employees as alleged in the complaint, but alleging that it had done so because of inefficiency and not because of their membership or activity in the union (R. 28–37).

Hearings on the complaint were held on March 23, 24, 25 and 26, 1936, before John M. Carmody, a member of the Board acting as trial examiner, and on May 2, 1936, before J. Warren Madden, Chairman of the Board acting as trial examiner. During the course of the hearing petitioner's objection to the jurisdiction of the Board was overruled (R. 43), and its motion to dismiss the complaint on the ground that the evidence did not support the allegations was denied (R. 373). Upon motion of counsel for the Board, the complaint was dismissed at the hearing as to 3 of the 21 employees alleged to have been discriminated against (R. 485, 493). Petitioner appeared and participated in

the hearing, and was given full opportunity to introduce evidence and cross-examine the witnesses called by the Board.

On May 21, 1936, the Board handed down its decision setting forth its findings of fact (R. 528–547), and entered the order which is here being reviewed (R. 548–549). These findings may be summarized as follows:

1. *Nature of petitioner's business.*—The Washington, Virginia and Maryland Coach Company, petitioner herein, is a Virginia corporation, organized in 1926, with its main office and garage at Clarendon, Virginia. It operates motor buses on regular schedule between points within the District of Columbia and points within the State of Virginia, in the transportation for hire of passengers, United States mail, newspapers, and occasional express shipments. It no longer operates buses on regular schedules from the District of Columbia to the State of Maryland but occasionally operates buses between such points (R. 528).

Petitioner has received a certificate of convenience and necessity from the Federal Bureau of Motor Carriers in accordance with the Motor Carrier Act of 1935, and also possesses an interstate permit granted by the District of Columbia and an intrastate permit granted by Virginia. Accordingly, petitioner must transport all persons and property picked up in the District to points in Virginia, but it may engage in local transportation in Virginia. In practice, more than 50 per cent

of the passengers picked up in Virginia are transported to points within the District. (R 528, 529.) Petitioner's business has grown rapidly, and in 1935 it transported 2,436,236 passengers (R. 529).

In the course of its business petitioner now operates 48 buses and has approximately 80 employees, of whom 50 are drivers, 27 are garage employees, and 3 are office employees. The bus operators are actively engaged in operation of instrumentalities of interstate transportation. The operations of the garage situated at Clarendon, Virginia, are also an integral part of petitioner's interstate transportation system; there the buses are serviced and made ready for their scheduled runs. Such servicing is essential to the safe and regular functioning of the bus system. In other words, "the garage employees are actively working upon instrumentalities of interstate transportation and are engaged in operations in the course and conduct of interstate transportation." (R. 529, 545.)

2. *The Unfair Labor Practices.*—Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Local No. 1079, a labor organization, was chartered on March 3, 1936 (R. 530). Thereafter the petitioner, on March 4, 5 and 6, 1936, discharged 21 of its employees, all of whom were members of the Union. The Board reviewed the facts in detail (R. 530–544) and concluded that petitioner discharged 18

of these employees because of their union membership and activity, discriminated in regard to their hire and tenure of employment in order to discourage membership in the Union, and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 544–545). The evidence supporting the Board's findings on the merits is discussed in detail *infra*, pp. 24–42.

In conclusion, the Board found that the operations of petitioner occur in the course and current of transportation within the District of Columbia and between the District of Columbia and the States of Virginia and Maryland. It also found that the unfair labor practices engaged in by petitioner burdened and obstructed that commerce, and had led and tend to lead to labor disputes which impair the efficiency, safety and operation of instrumentalities of commerce (R. 546).

On the basis of these findings, the Board concluded that petitioner was engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act (R. 547). It therefore issued an order (R. 548–549) requiring petitioner to cease and desist from discouraging membership in Local No. 1079, or any other labor organization of its employees, by discrimination in regard to hire or tenure of employment, or from in any other manner interfering with, restraining

or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act; and to offer their former positions to the 18 discharged employees, with all the rights they had previously enjoyed, and to pay them a sum equal to that which they would have earned during the period from their discharge to the offer of reemployment, less any sum they had earned during the period (R. 548–549). Petitioner's motion for rehearing and reconsideration (R. 553–555) was denied by the Board (R. 556).

On June 9, 1936, the Board filed in the court below a petition for the enforcement of its order, pursuant to Section 10 (e) of the Act (R. 1–5). On October 8, 1936, the court entered its decree that the order of the Board be enforced, and that petitioner abide by and perform the directions therein contained (R. 598–599).

ARGUMENT

I

THE NATIONAL LABOR RELATIONS ACT, AS HERE APPLIED, IS CONSTITUTIONAL

In the brief filed on behalf of the Board in No. 365, *The Associated Press* v. *National Labor Relations Board,* we have shown that subsections (1) and (3) of Section 8 of the Act, as applied to interstate enterprises, are a valid exercise of the commerce power, and that these provisions of the Act are consistent with the Fifth and Seventh Amendments to the Constitution. We have also shown in that brief that the validity of other provisions of

the Act, and the application of the Act to other classes of persons need not be determined in considering the provisions and application here involved.

The application of the Act in the instant case need not be discussed at length. Petitioner is admittedly a common carrier in interstate commerce by motor bus, and the employees involved are engaged in work in the course and conduct of such interstate transportation. *Supra,* pp. 5–6. The argument already made in No. 365 with respect to the application of the Act to The Associated Press applies *a fortiori* here. If Congress may, in order to facilitate the amicable settlement of disputes, seek to make the appropriate collective action of employees on interstate railroads an instrument of peace rather than of strife, it may likewise do so with respect to the employees of an interstate bus system devoted to the transportation of passengers, mail, and express shipments. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570.

Petitioner contends, however, that if the Act is invalid as applied to an enterprise engaged partly in manufacturing and partly in interstate commerce, the whole Act must fall, and, further, that if the Act be unconstitutional as applied to such enterprises, it may not be applied to petitioner. In support of this position petitioner contends that the administrative interpretation of the Act has been "nation-wide and fancy free"; cites as au-

thority a table compiled from the First Annual Report of the Board purporting to show the small number of "interstate cases the Board has taken under consideration contrasted with the large number of cases involving local manufacturing or production" (Br. p. 49); and concludes from this that "the administrative interpretation of the Act is therefore overwhelmingly in favor of petitioner's contentions that it was intended to apply to local manufacturing and production" (Br. p. 51, note). Second, petitioner contends that the Act is void in toto because Congress would not have passed the statute if its application was to be limited to such "interstate cases" (*Id.* p. 66).

We have shown in detail in the brief for the Board in No. 365, *The Associated Press* v. *National Labor Relations Board,* at pp. 111–118, that Congress intended by this Act to remain within the limits of the constitutional power of Congress under the commerce clause, and that Section 2 (7) contains a jurisdictional limitation in language appropriate to that end. This jurisdictional requirement must always be met, and the Board's findings with respect thereto are subject to full review in the circuit courts of appeals and ultimately in this Court. Accordingly, should the Board err in its application of the Act, the courts will correct the error by holding that the order exceeded the Act, not that the Act exceeded the commerce power. This interpretation has been adopted by every circuit court of appeals which

has passed upon the validity of orders under the Act. See brief for the Board in No. 365, pp. 112–113. The opinion of Circuit Judge Wilbur in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, Jan. 11, 1937 (C. C. A. 9th), upon which petitioner relies in another connection (Br. p. 42), correctly stated on this question:

> In view of the definition of commerce contained in the Act, and the use of the familiar expressions relating thereto: "burdening", "obstructing", and "free flow of commerce", the Act by its terms is expressly confined to the regulation of interstate commerce. Any attempt to apply the Act to activities other than interstate commerce and to matters which only indirectly affect such commerce, is not authorized by the terms of the Act if properly construed. There is, therefore, no difficulty to be encountered by the courts in limiting the Act to matters within the commerce clause of the Constitution, for Congress has already done so. If the officials of the government in executing this statute have attempted to extend it to matters wholly intrastate in character they have done so in the teeth of the statute and the federal Constitution.

Moreover, it is clear that the Board has never construed the Act as applicable to all industry. See brief for the Board in No. 365, pp. 115–117.[1]

[1] The table of so-called "interstate" and "intrastate" cases compiled by petitioner (Br. pp. 49–51) is wholly without significance. Congressional power clearly extends to local activities directly affecting interstate commerce. See brief

Nor is petitioner convincing in its second argument that the purpose of Congress in passing the Act would be thwarted if the Act were to be limited to those enterprises wholly engaged in or about interstate commerce. Even as so limited, it would be completely workable and have an important application to a variety of industries the uninterrupted operation of which is at least as essential to the commercial life of the nation as those subject to the Railway Labor Act of 1926. See brief for the Board in No. 365, at p. 118.

The motor transportation industry may be taken as an illustration. Within recent years that industry has developed into a gigantic network of freight and passenger lines reaching into virtually every city and town in the United States.[2] So

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for the Board in No. 419, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, at pp. 40–51. The types of employees involved, the nature of their work and its relation to the interstate commerce of the employer, and the present or potential effect of labor disputes in the enterprise must be determined upon individual records, and certainly cannot be ascertained from the name of the employer, as petitioner seeks to do. Moreover, about 60 percent of the cases listed have not yet been decided by the Board, and petitioner makes no attempt to distinguish cases arising in the Territories and the District of Columbia, where Congressional power is plenary.

[2] In 1935 there were 33,440 operating agencies in the bus industry, owning 117,850 buses operating over 1,324,774 miles of route. The value of this rolling stock was $469,087,000, and the value of terminals, garages, etc., was $185,500,000. *Bus Facts for 1936* (National Association of Motor Bus Operators, 1936), p. 5. In contrast, the total mileage of railroad routes in the United States in 1935 was 241,822.

phenomenal has been the growth of this new branch of the transportation field that it now seriously challenges the status of steam and electric carriers as the prime agencies of interstate transportation.[8] In the Motor Carrier Act of 1935,

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World Almanac (1937), p. 318. Accurate and complete statistics are not available to indicate the proportion of the bus industry operating in interstate commerce. Some indication may be had, however, from the available data respecting The Greyhound Lines, the largest of the interstate carriers in the industry. This is a nation-wide system of affiliated and connecting companies affording motor bus transportation to every State in the United States and to some cities in Canada. The entire system presents striking similarities to our national railroad systems. In 1934 the Greyhound Lines operated 125,170,245 bus miles, traversing 42,863 miles of route, with 1,614 buses. *Moody's Manual of Investments* (1935), p. 1808. The Pennsylvania Greyhound Lines, Inc., one of the units in this system, operates 5,000 miles of route between New York, St. Louis, Indianapolis and other points. A petition by the Board for the enforcement of a cease and desist order against this company under the Act is pending in the United States Circuit Court of Appeals for the Third Circuit (No. 6007, March Term, 1936). See *In the Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1 (1936).

Motor truck registrations in 1934 totaled 3,409,335. *Motor Truck Facts* (Automobile Manufacturers Association, Inc., New York, N. Y., 1935), p. 3. No accurate data are available indicating the proportion of the industry which is engaged in interstate commerce. Sen. Doc. No. 43, *Coordination of Motor Transportation*, 72d Cong., 1st Sess., p. 57. *Cf. Hours, Wages, and Working Conditions in the Intercity Motor Transport Industries, Part II, Motor Truck Transportation* (Federal Coordinator of Transportation, 1936), p. 191.

[8] See H. Doc. No. 89, Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pp. 3–6, 10–18; Sen. Doc. No. 152, *Regulation of Transportation Agencies*,

Congress prescribed detailed regulations of the industry comparable to those long since applicable to steam and electric carriers in interstate commerce. Act of August 9, 1935, c. 498, 49 Stat. 543; U. S. C. Sup. I, Title 49, Secs. 301–327. Petitioner has qualified as a common carrier under this legislation (R. 529). In view of the increasing burden of interstate transportation, both freight and passenger, assumed by the motor transport industry, Congress would have been unreasonable indeed if it had not intended through the National Labor Relations Act to bring to that industry the same measure of industrial peace which came to the railroads under the Railway Labor Act of 1926.

In like manner, the Act has been invoked against water transportation systems such as the United Fruit Company and Agwilines, Inc., against communication systems such as Western Union Telegraph Company, Mackay Radio & Telegraph Company, and The Associated Press, and against various enterprises in the Territories and the District of Columbia. Can it be said,

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73d Cong., 2d Sess., pp. 9, 13, 15–25; *Cf. Nashville, Chattanooga & St. Louis Ry. Co.* v. *Walters*, 294 U. S. 405. In order to meet this competition, the railroad carriers have acquired extensive interests in motor truck and bus operating companies (Sen. Doc. No. 152, *supra*, at pp. 279–324; *Coordination of Motor Transportation*, 182 I. C. C. 263, 277–278, 393–396 (1932)), and have recently introduced on a wide scale free pick-up and delivery service on less than carload freight, under approval of the Interstate Commerce Commission. *Pick-up and Delivery in Official Territory* (I. C. C. Docket Nos. 4191, 27425, Oct. 13, 1936).

with reason, that the probability is "plain enough" that Congress would not have enacted this statute in order to safeguard these vital fields of interstate and foreign transportation and communication against interruption by industrial strife? Congress made the contrary clear not only by its frequent declarations that the Act was to be effective to the extent of Federal power, but also by the separability provision in Section 15, and by the separate enumeration of unfair labor practices "in commerce" in Section 2 (7). See brief for the Board in No. 365, *The Associated Press* v. *National Labor Relations Board*, pp. 111–115.

II

THE BOARD'S FINDINGS ON THE MERITS ARE SUPPORTED BY THE EVIDENCE AND ARE THEREFORE CONCLUSIVE

Petitioner contends that the Board's findings on the merits are not sustained by the evidence (Br. pp. 12–40). It is a sufficient answer that this issue is not open to petitioner, since it was not among the questions presented in its petition for a writ of certiorari. *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242. Nevertheless, we address ourselves briefly to petitioner's argument, particularly as it bears on certain general aspects of the administration of the Act.

The Board's finding of fact on the merits (R. 530–545) were made after two hearings conducted

by individual members of the Board acting as trial examiners. All parties were given the fullest opportunity to adduce evidence and to cross-examine. The findings are detailed and show on their face the care with which every substantial item of evidence was considered and weighed. The Board specifically found that petitioner had discriminated against 18 of its employees "for the purpose of discouraging membership in the union, and that by such acts, [it] has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" (R. 544–545). The Board thus made a specific finding of discriminatory intent. On the basis of this finding, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of the Act (R. 547).

The court below, after reviewing the record in detail, concluded that "it was a reasonable inference" from the facts that the discharge of the men was connected with their membership in the union; that there was direct evidence that respondent's officials in certain cases expressly stated that the discharges were caused by the union activity of the men concerned (R. 593); and that "it cannot be said that there was no substantial evidence to support the Board's findings, and consequently the petition of the Board cannot be dismissed for failure of proof" (R. 594).

Section 10 (e) of the Act expressly provides that "the findings of the Board as to the facts, if sup-

ported by evidence, shall be conclusive". It is settled that in reviewing findings of fact under comparable statutory machinery and provisions, neither the Circuit Court of Appeals nor this Court will make its own appraisal of the testimony, but will reverse or modify only if the findings are clearly improper and there is no substantial evidence to support them. *Florida* v. *United States*, 292 U. S. 1, 12; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Del Vecchio* v. *Bowers*, 296 U. S. 280; cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 559–560; *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3.

While petitioner contests the finality of the Board's findings measured by this test (Br. p. 3), it argues principally that the court below and this Court have the power to make an independent examination of the testimony on the question of discrimination, because this finding is alleged to be in violation of its constitutional rights under the Fifth Amendment (Br. p. 15). The authorities relied upon are *Crowell* v. *Benson*, 285 U. S. 22 and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. We submit that this argument is not well taken.

The *St. Joseph* case is one of a series in the field of public utility regulation in which the doctrine has developed that a claim of confiscation entitles the utility to "the independent judgment of the courts as to both law and facts." *State Com-*

mission v. *Wichita Gas Co.*, 290 U. S. 561, 569; *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349. However, recent decisions of this Court indicate that in this field there is, contrary to petitioner's contention (Br. p. 13) a difference in principle between the issue of confiscation, *i. e.*, the "taking" of physical property by the fixing of an inadequate rate of return, and other issues under the due process clause. *Acker* v. *United States*, 298 U. S. 426, 433–434; *Morgan* v. *United States*, 298 U. S. 468; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 364, 368. See also *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49.

The case of *Crowell* v. *Benson*, *supra*, upon which petitioner also relies, was restricted to a proceeding *inter partes*. 285 U. S. at pp. 51, 57–58.

It cannot be assumed that either of these cases overturned the established procedure of quasi-judicial bodies such as the Federal Trade Commission, upon which the present Act is patterned. Under the Trade Commission Act it is thoroughly established that if there be substantial evidence to support the finding, the courts will not make their own appraisal of the evidence. *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Kreuta* v. *Durning*, 69 F. (2d) 802, 804 (C. C. A. 2d). Similarly, with respect to other quasi-judicial tribunals,

the courts have refused to weigh the evidence, and have accepted as conclusive findings of fact which had substantial support in the record. See, *e. g.*, *Florida* v. *United States*, 292 U. S. 1, 12; *Virginian Ry.* v. *United States*, 272 U. S. 658, 665–666; *Phillips* v. *Commissioner*, 283 U. S. 589, 600; *Bartlett* v. *Kane*, 16 How. 263, 272; *United States* v. *Ju Toy*, 198 U. S. 253; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–110.

Apart from this, the finding of discrimination under Section 8, subsections (1) and (3) of the statute at bar is not "jurisdictional" in the sense of the term used in the *St. Joseph* and *Crowell* cases. The finding of discrimination goes merely to the application of substantive provisions of the Act to an employer and employees admittedly engaged in interstate transportation. While such a finding of fact conditions the action of the Board, so does any other finding on any of the unfair labor practices; they are findings which "may appropriately be subjected to the scheme of administration for which the Act provides." *Crowell* v. *Benson*, 285 U. S. at 64–65. The administrative finding of discrimination under this Act would appear to be more remote from basic "jurisdictional" issues than administrative findings as to whether an employee's injury arose out of and in the course of the employment (*Voehl* v. *Indemnity Co.*, 288 U. S. 162) and as to whether an employee's injury was accidental or self-inflicted, *Del Vecchio* v. *Bowers*, 296 U. S. 280, which have been given

finality if supported by substantial evidence. If like finanlity may be given to the findings of the Interstate Commerce Commission as to whether an intrastate rate discriminated against and burdened interstate commerce, *Florida* v. *United States,* 292 U. S. 1, 12, then there can be no valid objection to the same rule as applied to a finding of the National Labor Relations Board on the merits of an unfair labor practice *admittedly* occurring "in commerce."

If petitioner's argument were consistently applied, it would overturn the entire procedure established in this Act for the determination of the facts on the merits in individual cases under any subsection of Section 8, even where, as here, the employment relationship admittedly exists, the employer and employee are admittedly engaged in interstate commerce, and the procedure before the Board conforms to the statute. No such conclusion is warranted from the cases relied upon, and no lower court has so construed the Act. See *Agwilines, Inc.,* v. *National Labor Relations Board,* decided Dec. 22, 1936 (C. C. A. 5th) and *National Labor Relations Board* v. *The Associated Press,* 85 F. (2d) 56, 58, in addition to the decision below (R. 592).*

* The statement in *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A. 5th) upon which petitioner relies (Br. p. 16), was concerned with "jurisdictional findings." The same Circuit has made clear that the Board's findings on the issue of discrimination are

Finally, even if an independent examination of the facts be made, this does not require or justify disregard of the weight which may properly attach to the findings of the expert administrative body upon hearing and evidence. The petitioner, in seeking to upset the Board's findings, nevertheless "carries the burden of making a convincing showing", and the Board's findings will not be disturbed except as error is "clearly established" or as they are "plainly shown to be over-borne". *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. at 53, 54. The Board's findings here are clearly supported not only by substantial evidence but by the preponderance of the evidence. The situation at bar is therefore comparable to that in the *St. Joseph* case. The court below stated the applicable rule as that given in the *Algoma* case (R. 592), but nevertheless examined and weighed the evidence in detail in its decision (R. 592–594).

In considering the evidence in detail, it is important at the outset to note that in weighing the evidence, the Board did not, as petitioner contends (Br. p. 34), substitute its judgment for that of petitioner on the efficiency of the employees involved. No competent evidence on this issue was excluded.[5] Nor did the Board put the burden of

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conclusive if supported by evidence. *Agwilines, Inc.*, v. *National Labor Relations Board*, decided December 22, 1936 (C. C. A. 5th).

[5] Petitioner is mistaken in its assertion (Br. pp. 9, 11, 23) that the Board prevented it from submitting in evidence "the efficiency records of the union men discharged, together

disproof of discrimination on the petitioner. Of course the Board carries the burden of proof in

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with the efficiency records of the nonunion men not discharged in order that a comparison between the two sets of employees might be made". The fact is that the examiner gave petitioner wide latitude with reference to evidence on the efficiency question. Four types of records are referred to in the transcript, as follows: (1) Reports of a confidential investigator or "spotter" relative to the conduct of various bus operators during a ten day period beginning November 26, 1935, were offered by petitioner, were read into the record by petitioner (R. 291–295), and were admitted bodily (R. 218–219, Exh. 3). (2) Reports by petitioner to a casualty company concerning accidents in which any of the bus drivers here in question were involved, were offered by petitioner, England, petitioner's assistant general manager, testified from them (R. 297), and they were received in evidence (R. 311, Exh. 7). (3) Petitioner's garage superintendent, Wilsey, was permitted to testify respecting the efficiency of the garage employees here involved from his own records, despite the fact that the records were made up by him a few days before the hearing (R. 444–446). (4) Apart from all the foregoing, petitioner sought to introduce and the examiner excluded (R. 311) certain records respecting "service" or "road" calls on its bus operations. The records themselves were properly excluded because their purport was obscure, and, among other defects, they were not shown to be related to any particular employees (R. 310, 109–116). These records showed, according to petitioner, only the *number* of road calls in the few months preceding the discharges (R. 109, 114); petitioner's witnesses testified from their own recollections that this number was greater than for preceding periods (112, 311, 312, 109 *et seq.*). It is apparent that the exclusion of the records as such was not material. Petitioner made no request that they be identified and incorporated in the record for purposes of subsequent review.

Contrary to the repeated assertions in petitioner's brief (pp. 9, 11, 23), petitioner at no time offered specific evidence

the administrative proceedings, and did so in this case.[6] In the Board's brief in No. 365, *The Associated Press* v. *National Labor Relations Board*, pp. 97–98, it was pointed out that nothing in the Act or in the Board's proceeding in the various cases at bar trenches upon the normal exercise of the employer's right to discharge employees for inefficiency or any other reason including sheer caprice, provided, however, that the employer does not use the power of discharge as a means of in-

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on the efficiency records of particular employees retained, for purposes of comparison with those of the particular employees discharged. When the Board's counsel pressed petitioner's officers for such comparative data, either from records or from memory, petitioner's counsel stated that such data could not be had (R. 309). What does appear of record is Wilsey's testimony that he "could have written something" about all the garage employees, those retained as well as those discharged (R. 446), and Arnold's testimony that there were men still in his employ who should have been discharged long ago (R. 470).

[6] Petitioner's statement to the contrary (Br. p. 18) is based solely on the expert testimony of William M. Leiserson, Chairman of the National Mediation Board, and is wholly unwarranted. At the suggestion of counsel for petitioner, a stipulation was made whereby, subject to petitioner's general objection (R. 388), the expert testimony of this witness on the efficacy of the Act's provisions in eliminating industrial strife, given in another case before the Board, was incorporated in this record (R. 561–583). On cross-examination, the witness was asked by petitioner's counsel for, and accordingly stated his views on desirable and sound management practices in situations such as that at bar, but expressly declined to construe the requirements of this Act or to weigh the facts of this case (R. 393, 395, See also R. 398).

terfering with the right of employees to organize and choose representatives. In so far, therefore, as the ensuing discussion of the evidence refers to questions of efficiency, or other reasons given by petitioner in justification of the discharges, this is done only for the purpose of ascertaining the ultimate fact—petitioner's actual intent and purpose in discharging these particular employees.

In discussing the Board's findings, petitioner endeavors to create the erroneous impression that the Board had nothing more before it than the "coincidence" in point of time between the formation of the union and what it describes in its brief as a "housecleaning", *i. e.*, the discharge of 21 employees, all members of the union. Upon that petitioner builds its major thesis that "the Act, as construed and applied herein, throws upon the employer the burden of proof that in exercising his constitutional right to discharge he must be prepared to prove conclusively that the men discharged were discharged for some reason other than their union activities" (Br. p. 23), and then asks the rhetorical question, how an employer determined to "clean house" for inefficiency at a time when his employees were forming a union, can avoid subjecting himself to the stigma of violating the Act (Br. p. 18). Petitioner's major premise is untenable, as a review of the evidence plainly shows. The sequence of circumstances, the statements and admissions of petitioner's officers, the quality of the testimony, all taken together, are

such as to lead the trier of the facts irresistibly to the conclusion that petitioner looked to union membership and activity, not efficiency, in singling out for discharge the employees here involved.

The circumstances of the discharges were as follows: On February 24, 1936, a preliminary organization meeting of about 24 employees was held at the home of Theodore W. Frederick, one of the employees later discharged (R. 136, 173, 181–182). On the night of February 27, 1936, petitioner, through Hammond H. England, its secretary-treasurer and assistant general manager, first learned of the employees' attempts to form a union (R. 88, 314–315). The next morning, February 28, England admittedly went the rounds, asking employees about their membership in the union (R. 89–99). Later that day six bus drivers were summoned to petitioner's office and were questioned by England and Leon Arnold, petitioner's president, and Joseph Arnold, petitioner's vice-president and son of Leon Arnold, as to whether they had joined the union (R. 223, 473). When five of the six replied that they had joined, Leon Arnold recited certain unpleasant experiences he had had with a union and then told them to leave word the next day at the office as to whether they intended to continue their union affiliation (R. 223, 474). Among the operators so questioned were Magaha and Crissman, who did not comply with Arnold's request (R. 474, 223) and who were discharged five days

later. Leon Arnold admitted having spoken to employees about the union, admitted asking them to think it over and advise him of their intention in the matter, but denied asking them to do so by the next day (R. 466–468).

On February 29, promptly after petitioner learned of the formation of the union and the day after the first conversations referred to above, Wilsey, petitioner's garage superintendent, acting under instructions from Leon Arnold, inserted in the Washington Herald, of Washington, D. C., a notice that employees were wanted (R. 46, 49, 122, 422). Several hundred responses were received and from the applicants several were subsequently hired to fill the places of the men discharged (R. 427–428).

On the next day, March 1, 1936, petitioner distributed among the employees a small circular, described as a "personal message from Leon Arnold", which pointed out in part that "one sure way to acquire a poor standing, both in position and pay, in a business organization is to acquire a good standing in a clique" (Exh. 2). Petitioner's witnesses testified that the appearance of this "personal message" at the time of the help-wanted advertisement was a mere coincidence (R. 54, 315–321, 422); that petitioner had previously decided to discharge certain employees for inefficiency (R. 46, 412, 421); and that the circular was but the next one in a series which it obtained from a Chi-

cago firm for regular weekly distribution (R. 85–86).[7]

On March 3, 1936, at 11:30 P. M., the group which had attended the initial gathering on February 24, again met at Frederick's home and received the union charter from Clark, a representative of the national organization (R. 182). Present at this meeting and wearing a driver's cap was Joseph Arnold, petitioner's vice-president (R. 182–184, 375). Arnold read the charter, asked questions of Clark concerning the union, and entered into the discussion generally (R. 189–190). At one point he inquired whether the union would feed the men if they were fired (R. 189). When one of the employees advised Clark, who was unaware of Arnold's identity, that Arnold was an officer of petitioner and the son of Leon Arnold, Clark asked Arnold to leave. Arnold then asked if he could be-

[7] Petitioner refers to the word "coincidence" as one with which it is "pilloried by the prosecution" (Br. pp. 15, 38). But the record shows that the word was introduced and repeated by petitioner's own officers. Thus Wilsey testified that he told the various employees at the time of their discharge that their union membership was "a mere coincidence" (R. 414). England testified that when the message referring to "cliques" was issued by petitioner, its officers talked about it and "we thought it was a funny coincidence for it to come out at the particular time when we heard a union was being formed" (R. 316). Wilsey was asked, concerning a help-wanted advertisement inserted immediately after learning of the formation of the union, "Why was it [the 'ad'] put in on February 29th?" He answered: "It just happened to be a coincidence, and I thought I would get it over quick" (R. 422).

come a member or an honorary member. Upon receiving negative replies, he left the meeting (R. 190, 376). Arnold testified that Frederick had invited him to attend the meeting and explained that he wore the driver's cap because he had mislaid his hat (R. 374, 384). Frederick denied that he had invited Arnold and testified that he had never seen Arnold wear a driver's cap on any other occasion, although he had seen him a dozen times a day for a number of years (R. 183–184). Arnold admitted he was not a driver (R. 375). Regardless of whether Arnold concealed his identity, his presence at the meeting was a flagrant interference by the management with its employees' self-organization. It is apparent, moreover, why no employee asked him to leave, in view of the possibility of incurring the disfavor of the management.

Harmon, one of the men later discharged, testified that on his return to work from the meeting that night, Wilsey, the garage superintendent, expressed to him his surprise that Harmon had joined the union, and declared that Leon Arnold would put his buses on a lot and burn them before he would recognize the union. Wilsey asked Harmon if he could meet Clark, the representative of the national union organization. The two started back toward Frederick's home, but were advised by other employees whom they encountered that Clark had departed (R. 139–140). As they were returning to the petitioner's garage, they met Leon Ar-

nold, who had driven up in an automobile. It was then about 2:30 A. M. of March 4 (R. 140). Arnold was nervous and excited. Wilsey first denied having heard Arnold say anything, but then admitted that Arnold stated, among other things, that "things wasn't like that when he was a boy * * * and that he believed in every man standing on his own feet" (R. 422, 423–427).[8]

Later in the same morning (March 4) petitioner began to discharge its employees, and by March 6 had discharged a total of 21, one-fourth of its total force. All were members of the union, which then had about 57 members among petitioner's employees (R. 182). The six discharged on March 4 were bus operators; the seven discharged on March 5 were members of the day shift at the garage; and the eight discharged during the night of March 5–6 constituted the night shift at the garage.

The reason given all of the employees who were given any reason at all for the petitioner's action was their participation in the formation of the

[8] Arnold admitted he had met Wilsey and Harmon under the circumstances described above, even though it was unusual for him to be around the garage at 2:30 in the morning (R. 464). He denied that any conversation took place relative to unionism or anything else, even denying the statement which Wilsey attributed to him about things not being "like that when he was a boy" (R. 462). Wilsey also admitted having requested to see Clark, and when asked why, first answered: "You can't tell, I might have been interested, and nobody knows." When asked in what he might have been interested, he replied: "In investigating the union; and I may want to become a member." (R. 421.)

union. Thus, Theodore W. Frederick testified that when he was discharged by Wilsey, the garage superintendent, Wilsey stated he was not being discharged because of joining the union but because "of the underhanded way" that he had gone about it (R. 190). Harmon, working night foreman at petitioner's garage, testified that England likewise told him that he was discharged for "the way you went about it", adding in explanation of this last statement that Harmon "should have come to him for advice" (R. 141). Like reasons were given five other employees on the occasion of their respective discharges. James Atwell was told by England that he was discharged because he had gone to union meetings (R. 270); Roy Miller was told by Wilsey that he had been "misled", and was being fired on account of the union (R. 487–488); Robert T. Smith was told by England that "You guys started something and I got ahold of it before it went far enough to amount to anything" (R. 265); George Beall was told by Wilsey that the union was the cause, that he should not have joined "without saying anything about it", and that "the old man" [Leon Arnold] would not recognize the union (R. 233); Philmore Frederick was told by Wilsey that he was being discharged for having a union application blank in his possession (R. 241–242). Indeed Wilsey himself, after denying having had any conversation with Harmon, admitted upon further cross-examination that Harmon did say to him "I guess I am going on account

of the union", to which he had answered "Well, you can figure it out that way for yourself" (R. 432).

The Board, acting as would any reasonable trier of the facts, was justified in relying upon this mass of direct evidence that the discharge of these particular employees was motivated by petitioner's opposition to their organization activity, and in rejecting the denials of that testimony by petitioner's officers, particularly in view of the conceded sequence of events; the conceded acts and statements of petitioner's officers, and the evasive and contradictory character of their testimony.[9]

Petitioner insists, however, that the Board should have cast aside this mass of evidence and relied entirely on its claim that for some time prior to the discharges it had been troubled by inefficiency, that it had decided to "clean house", and that each of the employees here involved had been discharged on that account (Br. pp. 22 *et seq.*). In evaluating this contention, the character of petitioner's evidence to show that the inefficiency of these particular men was the basis for the discharges may properly be examined in determining the true motive for the discharges. *Supra,* pp. 23–24. It is apparent that in the considerable period of time in which most of these men were employed—ranging in the majority of cases from two

[9] See R. 428–429, 517–518, 315, 323, 328–329, 90, 413, 415–418, 421, 432, 444, 122–126, 361–364, 466–468. See also p. 29, footnote 8, *supra;* p. 39, footnote 13, *infra.*

to seven years—it is possible for petitioner *ex post facto* to refer to some instance in the course of their work as a ground for the discharge. At no time did petitioner offer testimony or records comparing the efficiency of the specific employees retained with that of the specific employees discharged (*supra*, pp. 21–23, footnote 5). Strongly indicative of the inconclusiveness of the grounds of inefficiency assigned by petitioner is the testimony of Wilsey, petitioner's garage superintendent, who made the selection of garage employees to be discharged (R. 57). In the course of his testimony, Wilsey referred to written notations which he had made about the men discharged (R. 446). He claimed that he had made mental notes of the inefficiency of these men during the course of their work over the preceding years, and had reduced them to writing only a few days before the hearing. When questioned about the fact that written notations were made only with respect to the men discharged and not with respect to all the employees under his supervision, he said, "I could have written something on all of them" (R. 446). Upon an appropriate record, the triers of the facts may reasonably infer that such incidents are pretexts to mask discrimination against employees because of union activity. See *Brotherhood of Railway Clerks* v. *Texas & New Orleans R. Co.*, 24 F. (2d) at 434; 281 U. S. at 560.

In the case at bar, all those discharged were union members; they had been employed over long pe-

riods of time during which they had received few, if any, complaints about their work; in not a single instance was a claim of inefficiency made at the time of discharge, and the particular incidents now referred to were not regarded at the time of occurrence as sufficient to justify discharge, lay-off, or even a reprimand, notwithstanding petitioner's established system of laying off drivers for definite periods on account of infractions of rules (R. 468), and of advising them of complaints (R. 339). Finally, it may also be noted that according to petitioner, no reasons whatever were given at the time of discharge, although it would seem that as recently as the evening of February 28, 1936, petitioner and its employees were "like one big family" (R. 466; see also R. 97); and that petitioner, in discharging more than half of its garage staff and replacing them with men hired through a newspaper advertisement published a few days before (*supra*, p. 26), acted with such haste that not all the places left vacant were filled for some days (R. 429), and five of those newly hired were subsequently discharged for incompetence (R. 429). Certainly the inference that petitioner's actual motive was the disruption of the organization of its employees is reasonable when it appears that the discharges followed hard upon the formation of the union, within a week after petitioner's officials received information about it, and that the intervening period is crowded with incidents showing that petitioner was actively endeavoring to prevent the

union movement and to persuade its employees not to join or continue therein. As the court below said, "It was a reasonable inference from these facts that the discharge of the men was connected with their membership in the union and there was also direct evidence that the respondent's officials in certain cases expressly stated that the discharges were caused by the union activities of the men concerned" (R. 493).

Motive, this Court has said, "is a persuasive interpreter of equivocal conduct", and petitioner is not entitled to complain because its activities were viewed in the light of the manifest interest and purpose revealed by all the circumstances and by the statements of its officers. *Texas & New Orleans R. R.* v. *Brotherhood,* 281 U. S. at 559.[10]

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[10] Petitioner contends that not all the union men were discharged and that more union men remained in its employ than it had discharged (Br. p. 40). This is scarcely material. It is obvious that petitioner did not need to discharge all its union employees in order to stamp out the organization among its employees; indeed, the discharge of one or two may be sufficient. Moreover, the union filed its charges under the Act immediately after the discharges in question, and the charges were promptly followed by conferences between the Board's regional director and petitioner's officers, and by the issuance of the complaint and notice of hearing (R. 9, 14, 51–52, 19). Those discharged included the union's financial secretary (West) and recording secretary (Theodore Frederick). Evidence that petitioner had other union members in its employ was not excluded, as petitioner implies (Br. p. 22), but was in fact brought out by the Board's counsel on direct examination (R. 194, 196, 197).

Petitioner also refers to rumors and charges just prior to the discharges here involved, emanating from unidenti-

The four drivers—West, Hall, Magaha, and Crissman—were ostensibly discharged on the basis of certain reports made in November 1935 by Mason, a special investigator or "spotter" who rode the buses, and of certain complaints received from passengers (R. 100, 326; Br. pp. 26–28). Petitioner's evidence lacked specification as to the complaints from passengers, except in the case of Crissman, and the complaint in that case was of minor importance and had been made eight months before (R. 325, 406, 399–400, 475.[11] The reports referred to disclosed a few alleged irregularities; none of a serious nature, occurring several months prior to the

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fied persons, that buses would be permitted to run wild, and that brakes were being tampered with (Br. pp. 21–22). But Storer, the bus inspector who tested the brakes, testified that he had not found any evidence of tampering with any of the buses (R. 78); and England's testimony shows he could not possibly have taken the rumors into account in selecting for discharge the particular employees here in question (R. 361–365).

[11] The improbability that the passenger's complaint could have played a part in petitioner's singling Crissman out for discharge is especially strong when it is noted that the passenger's complaint was provoked by Crissman's adherence to the rules of the company in each of the four instances he cited; viz, Crissman's refusal to honor during rush hour a transfer given the passenger by the operator of the preceding bus on the same route (R. 400), his refusal to issue a transfer to him during rush hours but, instead, going to the pains of overtaking the bus he did wish to transfer to and providing passage for him in that bus (R. 405), his refusal to admit a passenger on the bus with a dog (R. 409), and his failure to "be sociable" with passengers by talking with and passing the time of day with them while driving the bus (R. 407, 475).

date of discharge (R. 292–295).[12] One of the complaints now cited as the ground for Holt's discharge was discussed with Holt by Arnold at the time. Arnold told Holt his record had been "pretty good" and did not penalize him in any way (R. 171–172). On the other hand, neither West nor Hall had ever had an accident (R. 339, 336), and Crissman had not been involved in an accident for more than two years (R. 257). While Magaha had had several in the two years preceding his discharge, none was serious (R. 329, 331, Exh. 7), and none was considered by petitioner sufficient in itself to warrant discharge or other disciplinary action at the time of occurrence, notwithstanding its policy not to retain men who had accidents (R. 334). Magaha's accident records, according to England, were merely "taken into consideration" along with "other complaints" (R. 331).

[12] One ground relied upon, for example, is that on a bus crowded with passengers, the driver failed in isolated instances, to collect an additional fare from a passenger on entering a zone where additional fare was required. In crowded buses operated by one man who admits and lets out passengers, handles the mail, and looks after the equipment en route, the evidence shows that it is a physical impossibility for the one operator to keep track of the various zones in which every passenger enters, without an occasional slip-up (R. 428). So inconsequential were these omissions deemed by petitioner that other employees, as to whom similar omissions were noted by the investigator, are still employed (R. 326, 327), and that in the months following such report the petitioner at no time called any of its drivers to account or asked them to be more careful in the future.

These four drivers had been employed by petitioner for periods varying from two to six and one-half years (R. 168, 220, 255, 262). Each appeared to be a capable and desirable employee until he joined the union and, as previously pointed out (p. 25, *supra*), declined to resign from it. Arnold himself testified he was proud of the accident record of the company, that he had secured a reduction in insurance rates as a result of it, and that this record was accomplished through the aid of "some" of the employees discharged (R. 68–69). The Board's finding that discrimination was exercised as to these four employees is plainly supported not only by substantial evidence but by the overwhelming weight of evidence.

The same inference must reasonably be made with respect to the 14 garage employees here involved. The weight of the grounds now assigned by petitioner as the reasons for the discharge of these employees must be appraised in the light of Wilsey's statement that he "could have written something" on all of the garage employees, those retained as well as those discharged (R. 466; *supra,* p. 32). The seven men on the day shift—Miller, Theodore W. Frederick, Beall, Chase, Birch, Philmore W. Frederick, and McDonough—were discharged on March 5. There was ample evidence that the discharges of Miller, Beall, and the two Fredericks were expressly put on the ground of their union activity. *Supra,* p. 30. No complaints had ever been made as to McDonough

(R. 247), and petitioner, indeed, offered no evidence whatever to establish Chase's inefficiency. Theodore Frederick had been employed for over seven years and had been advanced to the position of working day foreman (R. 181). While it was stated that he had permitted the employees to converse during working hours on personal matters (R. 412), it was admitted that this was not contrary to the company's rules and would not be ground for criticism (R. 415, 436). With respect to Philmore Frederick, Wilsey said that while he had always been "mild", he became "kind of dominant" during the months preceding his discharge (R. 422). Wilsey referred to one incident where, on asking Philmore Frederick why he did not buy tools, the latter attributed his failure to do so to his low salary (R. 442). Wilsey in no way indicated, at the time the answer was made, that he deemed it either insolent or improper, as, indeed, he could not in view of the wide discrepancy between the salary of a helper ($18 weekly) and that of a regular mechanic ($25 to $35 weekly).

Miller was told by Wilsey on being discharged that his work had been "perfectly satisfactory, and if it wasn't, you wouldn't be here two days" (R. 487). Wilsey testified that Harmon, the night foreman, told him he wanted a better mechanic than Miller (R. 507). Harmon denied this, and testified that he told Wilsey additional men were required (R. 522). As to Miller, Harmon testified that he was as good a mechanic as he had ever had

(R. 520). Indeed, on Harmon's fortnightly night off, Miller, prior to his transfer to the day shift about March 1, 1936, had regularly been assigned to act as foreman on the night shift (R. 492, 513). Only the vaguest generalizations were cited to support petitioner's claim that Beall and Birch were inefficient. Neither had ever received a complaint concerning his work or been reprimanded (R. 449, 268, 236).

The same vague and unsubstantiated allegations of inefficiency were made in the case of the seven union members—Harmon, Garrison, Moore, Dove, Smith, McCaulley, and Atwell—on the night force at the garage who were discharged during the night of March 5–6, 1936.[11] Garrison, Moore, and Dove were bus washers. England, petitioner's assistant manager, testified that passengers had com-

[11] An example of Wilsey's evasive and loose testimony on the grounds of alleged inefficiency is the following: He stated at one point that he relied for his judgment of the men on the foreman, whose "word is law with me" (R. 415). Immediately thereafter, he testified: "I could observe these things for myself, and I would walk through the shop and stay later and look around a lot" (R. 415). This is followed by an assertion that he would come around at night and watch the place from the outside without being seen by any of the employees (R. 416–417). Probably realizing the improbability of his assertion that he could notice conditions inside in that manner, he then asserted that by watching from the outside, he occasionally could notice the commission of an error which he would immediately walk in to correct. When asked how many times in his eight years at the garage he had ever done so, he gave a page and a half of irresponsive testimony before admitting that he did not know (R. 418).

plained of soiling their clothes in the buses during the winter; that the company had had to pay for cleaning clothes in one or more cases; that the fault must have been with the night bus washers; and that Moore and Garrison were discharged on that account (R. 302–4). He failed to mention Dove, although seemingly Dove should have shared the responsibility so readily fixed on the other two men. The record showed, however, that during the bad weather of the winter months, time which Garrison, Moore, and Dove otherwise devoted to cleaning was frequently entirely consumed in handling chains for the tires (R. 142, 279). It does not appear that any of these men were apprised of these alleged complaints at the time, notwithstanding petitioner's practice to do so (R. 339).

As for Smith, a service man, McCaulley, a mechanic, and Atwell, a bus greaser, there was sufficient evidence to show the discharges of Smith and Atwell were expressly put on their union activity (*supra,* p. 30). Wilsey testified that on several occasions buses supposedly serviced by Smith had run out of fuel; that the night foreman had told him that McCaulley was a poor mechanic; and that Atwell had had a bad grease record for six and one-half years (R. 448, 447, 441–2). Smith testified that he had received only one complaint of a bus running out of gas and that had occurred six months prior to his discharge (R. 265–266). Petitioner failed to explain why, if Atwell had had a bad record for over six years, it had tolerated him

until just the moment of his union affiliation. Indeed Atwell testified that, on being discharged, England told him: "You have kept your work up good, and we never had any trouble with you" (R. 270). As for Harmon, he was the oldest employee in point of service (R. 168); England had told him he had always done good work (R. 141); and according to Wilsey, he had been promoted to the rank of foreman "because of his knowledge * * * and because of his ability" (R. 420). Petitioner sought to put on Harmon the responsibility for the "unsatisfactory" conditions in the shop (R. 33), but Wilsey, as garage superintendent, had a like responsibility (R. 112). Moreover, petitioner did not directly refute Harmon's testimony (*supra*, p. 30) that England referred to "the way you went about" joining the union as the cause of his discharge (R. 141); and Wilsey's testimony regarding his conversation with Harmon on the occasion of his discharge constituted a virtual admission that the union was at the bottom of the matter (*supra*, pp. 30–31).

There was, therefore, ample evidence in the record for the findings of the Board. It is difficult to take seriously petitioner's pretended dilemma—how to go about "cleaning house" on grounds of inefficiency simultaneously with the development of a union movement among employees (Br. p. 18). It is incredible that an employer acting in good faith, and without being motivated by opposition to the union at such a time, would question em-

ployees about their union affiliation as soon as he learned about it, advise them against it, ask them to reconsider and give their answer the following day, attend a union organization meeting, and discharge a large proportion of his working staff, all being union men, within one week of his learning of the formation of the union, including in this group many men who had never received any complaint about their work, and bring home to them no reasons for their discharge except in seven instances, where union activity was expressly given as the cause of discharge. Explanations offered in an attempt to evade the inference of discrimination deriving from the foregoing circumstances were vague and unsupported by specific proof. On the entire record, it was "a reasonable inference", as the court below said (R. 593), that these employees were in fact discriminated against to accomplish petitioner's persistent purpose to discourage and disrupt the newly launched organization of its employees. This was the "housecleaning" which petitioner intended and accomplished.

The conclusion that the discharges constitute unfair labor practices within the meaning of Section 8, subsections (1) and (3), follows as a matter of course. Petitioner's wholesale elimination of union members was a patent interference with self-organization and an obvious discrimination in regard to hire and tenure of employment in an effort to stamp out the union.

CONCLUSION

Wherefore, the judgment of the court below should be affirmed.

Respectfully submitted.

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